Supreme Court, U.S.
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No. 09-954

IN THE SUPREME COURT OF THE UNITED STATES

Isidoro Rodriguez,

Appellant,

v.

Virginia Employment Commission,

Appellee.

On Petition For Writ of Certiorari
to the Supreme Court of Virginia and
the Court of Appeals of Virginia

PETITION FOR WRIT OF CERTIORARI

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Isidoro Rodriguez's ("Rodriguez") has been deprived of his right to federal unemployment compensation benefits and substantive and procedural *due process* to a "fair hearing, before an impartial tribunal," as mandated by the 5th and 14th Amendments to the U.S. Constitution, the Social Security Act, Sec. 303. [42 U.S.C. 503], and 20 C.F.R. § 650.2, by the Virginia Employment Commission ("VEC"), finding "misconduct" based on holding as valid the Virginia State Bar Disciplinary Board (VSBDB") *void* order, and by retroactively applying the May 15, 2007 action of the District of Colombia Court of Appeals Committee on Admissions ("D.C. Committee"), to Rodriguez's termination date of March 29, 2007. The Court of Appeals of Virginia affirmed the VEC use of the VSBDB *void* order. The Supreme Court of Virginia dismissed for lack of jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

I. Whether Rodriguez Has Been Deprived of His Statutory Right to Federal Unemployment Compensation Benefits by the Finding of "Misconduct" Based on the Giving Validity to the VSBDB *Void* Order and Retroactively Applying the Unauthorized Actions of the D.C. Committee to the Date of Termination?

II. Whether There Has Been a Resisting of the Execution of Federal Laws by Fraud and Misprision of the Felony?

PARTY TO THE PROCEEDINGS

The caption of the case does contain the name of all of the parties.

Rodriguez is not a corporation.

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CITATIONS TO OPINIONS BELOW

The Order of the Supreme Court of Virginia and Court of Appeals are reproduced respectively at A-1, A-2, and A-3.

STATEMENT OF JURISDICTION

The order of the Supreme Court of Virginia was entered on February 2, 2010. The order of the Court of Appeals of Virginia denying an *en banc* rehearing was entered on November 12, 2009. The jurisdiction is invoked pursuant 28 U.S.C. 28 U.S.C. 1257(a).

STATEMENT REQUIRED BY RULE 29.4(b)

Pursuant to 28 U.S.C. § 2403(a), given that the Constitutionality of the Social Security Act, Sec. 303. [42 U.S.C. 503], and 20 C.F.R. § 650.2, are drawn into question by the VEC, as well as the Supreme Court of Virginia and the Court of Appeals of Virginia ("Lower Courts"), being guilty of misprision of treason[1] and misprision of a felon[2] to deprive Rodriguez of his right to federal unemployment compensation benefits, the

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[1]Va. Code § 18.2-481. Treason defined; how proved and punished. — Treason shall consist only in: . . . (5) Resisting the execution of the laws under color of its authority. Such treason, . . ., shall be punishable as a Class 2 felony. (Code 1950, § 18.1-418; 1960, c. 358; 1975, cc. 14, 15.)

[2]Va. Code 18.2-482. Misprision of treason., states that, "[i]f any person knowing of such treason shall not, as soon as may be, give information thereof to the Governor, or some conservator of the peace, he shall be guilty of a Class 6 felony.

Court is informed that this Petition has been served upon the Solicitor General of the United States in order that she file an *amicus curiae* brief.

FEDERAL CONSTITUTION, CODE, AND REGULATION SECTION INVOLVED

Fifth Amendment of the United States Constitution, states, "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

Fourteenth Amendment §1 to the United States Constitution, states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Social Security Act, Sec. 303. [42 U.S.C. 503]

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act[7], includes provision for— . . . .

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and . . .

20 C.F.R. § 650.2 Federal law requirements.

(a) Section 303(a)(1) of the Social Security Act

requires that a State law include provision for: Such methods of administration * * * as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

(b) Section 303(a)(3) of the Social Security Act requires that a State law include provision for: Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

STATEMENT OF THE CASE

A. Proceedings before the VSBDB

In retaliation for Rodriguez's successful past civil litigation the U.S. Department of Justice, John Doe 1-50 and John Doe Entities 1-10 ("DOJ *et al.*"), organized a criminal enterprise to deprive him of his right to employment as an independent federal litigator. The linchpin of this interstate conspiracy was for Beltway Lobbyist/Attorney Eric Holder *et al.*, to file in 2003 a fraudulent bar complaints from D.C. with both D.C. Committee and the VSBDB accusing Rodriguez of ethical violations for litigating to enforce his Federal and Virginia rights as a father under Treaty and Va. Code. Also, Beltway Lobbyist/Attorney Eric Holder *et al.*, conspired with Rodriguez's former client to file a fraudulent bar complaint accusing Rodriguez of ethical violations for litigating to enforce his perfected Virginia statutory Attorneys Lien.

The VSBDB issued a *void* order on November 27,

2006, revoking Rodriguez' license to practice law in Virginia. On December 14, 2006, Rodriguez advised the D.C. Committee where a waiver application had been pending since July 2005 of the VSBDB *void* order and demanded a show cause hearing.

The VSBDB *void* order was affirmed by the Supreme Court of Virginia on June 28, 2007. This Court denied a petition for certiorari, *Isidoro Rodriguez, Esq. v. Supreme Court of Virginia et al.*, (S. Ct. No. 07-419, November 2, 2007).

B. Employment by De Novo

While the VSBDB was investigating the fraudulent bar complaints, Rodriguez filed on July 15, 2005 a waiver application for admission to the D.C. Bar based on his being a member in good standing of the Supreme Court of Virginia for period the five years immediately proceeding the application. The evidence confirms that at all times from July 2005 to the present the D.C. Committee was in communications with the VSBDB, and was advised at all times the status of the VSBDB proceedings.

In January 2007, Rodriguez was hired in the District of Columbia by De Novo Legal ("De Novo") as a contract attorney for a two-month project based on his having a valid waiver application before the D.C. Committee since July 2005.

At the time of being hired Rodriguez advised De Novo of his litigation against the VSBDB *void* order. However, he was advised that for De Novo his status with

the Virginia State Bar was immaterial because the company rule for employment as a temporary contract attorney in the D.C. was that "**irrespective of either being only a recent law graduate, or being an experienced attorney admitted in any other jurisdiction, an employee was only required to have a J.D. Degree, and either be admitted into the DC Bar, or have an application pending before the D.C. Committee.**

But, on March 29, 2007, without notice De Novo changed its company rule **only** as to Rodriguez, to require that **only** he as an employee "in addition to having a J.D. and a pending D.C. waiver application" also be admitted to the Virginia State Bar. Based on this change Rodriguez was terminated on March 31, 2007.

After being terminated, Rodriguez demanded on April 6 and May 1, 2007 that the D.C. Committee pursuant to DC Rule 46(e), immediately either admit him based on his being a member of the Virginia State Bar in good standing for the five years prior to the date of his application filed July 2005, or provide a public hearing to permit him to demonstrate his good moral character, and his general fitness to practice law in DC.

After Rodriguez's termination the D.C. Committee issued a letter on May 14, 2007 striking the waver application and deprived him of his right to a public hearing.

C. Proceedings before the VEC

On October 29, 2007, the VEC issued a Monetary

Determination based on Rodriguez' employment with Legal Source, not based on employment with De Novo. Although no revised Monetary Determination was issued, on December 8, 2007 the VEC Deputy denied Rodriguez of his right to federal unemployment compensation benefits based on finding that he had been discharged for misconduct by De Novo because of the VSBDB *void* order.

On March 13, 2008, the Appeal Examiner affirmed: first, by depriving Rodriguez of his substantive and procedural due process right to challenge the finding of misconduct based on the VSBDB *void* order; and, second, alternatively finding misconduct by retroactively applying the D.C. Committee's letter of May 15, 2007, to De Novo's termination of Rodriguez on March 29, 2007.

On July 30, 2008, in total disregard of D.C. Rule 46[3] and without citing any legal authority the VEC affirmed stating that, "[o]nce his Virginia law license was revoked, he could not be admitted to practice law in D.C. until his Virginia law license had been rein

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[3] **Rule 46 Admission Without Examination of Members of the Bar of Other Jurisdictions.**

(3) Admissions Requirements. Any person may, upon proof of good moral character as it relates to the practice of law, be admitted to the Bar of this court without examination, provided that such person:

(i) Has been a member in good standing of a Bar of a court of general jurisdiction in any state or territory of the United States for a period of five years immediately preceding the filing of the application

stated."

D. Proceedings before Lower Courts

On December 5, 2008, the Fairfax County Circuit Court summarily dismissed the complaint. On appeal the Court of Appeals of Virginia surreally affirmed (A-3), and denied a motion for rehearing *en banc* (A-2). The Supreme Court of Virginia dismissed the appeal

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Rodriguez calls for the exercise of this Court, because both the Supreme Court of Virginia and the Courts of Appeal of Virginia have decided an important question concerning the right to receive federal employment which is in conflict with the Social Security Act, Sec. 303. [42 U.S.C. 503], and 20 C.F.R. § 650.2, the 5th and 14th Amendments to the Constitution, and the *Void* Order Doctrine under this Court's holding in *Marbury v. Madison*, 1 Crunch 137, 140 (1803), and *Pennoyer v. Neff*, 95 US 714 (1877).

I. THE VEC, THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA ARE PROHIBITED FROM DECLARING RODRIGUEZ GUILTY OF "MISCONDUCT" BASED ON THE ISSUANCE OF THE VSBDB *VOID* ORDER VIOLATIVE OF THE VA CONSTITUTION AND VA CODE

A. *The Void Order Doctrine in Virginia prohibits the declaring as valid the VSBDB void order to*

find "misconduct.".

As explained in *Marbury v. Madison*, 1 Crunch 137, 140 (1803), by Chief Justice Marshall a legislative act or judicial order which is "repugnant to the constitution is *void*."[4] Therefore, any judicial action contrary to the constitution is *void* in its entirety and inoperative as if it had no existence from the time of its issuance can be attacked in any proceeding where they come into issue. *Pennoyer v. Neff*, 95 US 714 (1877), *see also Jordon v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974)("**a void judgment is no judgment at all and is without legal effect**") (Emphases added).

Under Article VI § 1 and § 7 of the Constitution of Virginia the General Assembly has the exclusive power and authority to establish and give subject matter jurisdiction to "courts of records" and appoint judges in Virginia.[5] Also, in Virginia the jurisdiction

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[4]In a brilliant display of deductive logic the Chief Justice confirmed that impartial judicial review is a constitutional imperative by pointing out certain fundamental principles of our constitutional system giving limited authority to both Federal and State government: first, that the people had united to establish a limited government; second, that they organized it into three departments and assigned certain powers to each, while at the same time setting limits to the exercise of those powers; and, third, these limits were expressed in a written constitution, which would be a useless document "if these limits may, at any time, be passed by those intended to be restrained." *Id.* at 140.

[5]Judicial power," is defined as, "**[t]he authority vested in courts and judges to hear and decide cases and make binding judgements on them**: . . . . " Bryan A. Garner, Black's Law Dictionary, at

And judicial power to revoke an attorney's license is controlled exclusively by the General Assembly. As explained in *Legal Club of Lynchburg V. A.H. Light*, 137 Va. 249, 119 S.E. 55 (1923),

> Independent of statutory authority, all courts of record in Virginia have inherent power in a proper case to suspend or annul the license of an attorney practicing in the particular court which pronounces the sentence of disbarment. **The power to go further and make suspension or revocation of license effective in all other court of the Commonwealth must be conferred by statute.** *Fisher's Case, 6 Leigh* (33 Va.) 619. (Emphases added).[6]

Thus, the General Assembly enacted Va. Code § 54.1-3935, establishing the exclusive attorney disciplinary procedure which a "court" was to use to revoke a Virginia attorney's license beyond the limits of the *Fisher's Case, supra. See also,* When Has the Supreme Court of Appeals Original Jurisdiction of Disbarment Proceedings? R.H.C. Virginia Law Review, Vol. 10, No. 3 (Jan. 1924), pp. 246-248.

Consistent with the above, Va. Code § 54.1-3915,

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864 (8th ed. 1999).

[6]As Federalist 47, states the Virginia's Constitution declares, "that the legislative, executive, and judicial departments, shall be separate and distinct: so that neither exercise powers properly belonging to the other. . . ." Washington Square Press, p 109.

prohibits the Supreme Court from promulgating rules inconsistent from statutory procedure under Va. Code § 54.1-3935.[7] As explained in *Nelson v. Warden*, 262 Va. 276, 552 S.E.2d 73 (2001),

> Subject matter jurisdiction is granted by constitution or statute, it cannot be waived, and any judgment rendered without it is *void ab initio.* Lack of subject matter jurisdiction may be raised at any time, in any manner, before any court, or by the court itself.

Under Article VI, § 5 of the Constitution of Virginia, and VA. Code § 54.1-3915, the S. Ct. Of Va. has neither authority to delegate judicial power to the VSBDB nor the power to create an attorney disciplinary system with the VSBDB as a kangaroo court," in violation of the procedure established by the General Assembly under Va. Code § 54.1-3935, the grant of limited administrative authority to the Virginia State Bar.

Therefore, based on *Legal Club of Lynchburg v.*

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[7]In Virginia it is "well recognized rule of construction that if a Rule of the Supreme Court [of Virginia] is at variance with a statutory enactment, the terms of the statute must prevail." 1996 Va. AG 23, at page 2. Therefore, the three judge panel created Part Six, Section IV, Paragraph 13 of the Rules of Supreme Court of Virginia sitting outside of Richmond, Virginia in violation of Va. Code § 54.1-3935(B) is without jurisdiction to revoke an attorney's license, since their creation by the Supreme Court of Virginia violate the procedure established by the General Assembly under Va. Code § 54.1-3935.

A.H. Light, 137 Va. 249, 119 S.E. 55 (1923), the VSBDB neither has the jurisdiction nor judicial power to conduct any attorney disciplinary proceedings.[8] **The VSBDB was not created by the General Assembly, but establish as a kangaroo court under rules promulgated by the Supreme Court of Virginia.**[9]

In total disregard of the above, VEC, the Court of Appeals of Virginia and the Supreme Court of Virginia ("Lower Courts") assumed away the limitation and prohibition on the Judicial Branch under the

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[8]Under Va. Code § 54.1-3910 and 3935, in attorney disciplinary proceeding the General Assembly restricted the Virginia State Bar to limited administrative aid to a court of record upon its request to only conduct investigation and prosecution of a bar complaint filed with the court. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), at footnote 2.

[9]Recently in *In re: Isidoro Rodriguez, Esq.*, U.S. Court of Appeals for the District of Columbia, Docket No. 10-1016; Tax Ct Docket No. ADM 3-09, the U.S. Tax Court disbarred Rodriguez by surreally holding the VSBDB order as valid "because the Supreme Court of Virginia was given authority to promulgate rules to discipline an attorney." Thus, the restrictions under Art. IV of the Va. Constitution and the prohibition of Va. Code § 54.1-3915, assumed away so to permit the depriving of Rodriguez of his Federal statutory rights to employment. *See also In the Matter of Isidoro Rodriguez*, S.Ct Docket No. 08-942, filed January 18, 2009, cert denied, May 17, 2009; *Isidoro Rodriguez, Esq. v. Supreme Court of Virginia et al.*, (S. Ct. No. 07-419, November 2, 2007); *See also*, Motion for Injunction to Third Circuit denied U.S. Sup. Ct. Docket No. 08A858 (May 4, 2009), and Petition for Certiorari to Third Circuit, denied Docket No. 08-1121(May 18, 2009). *See also, Rodriguez v. Hassell, et al.*, Docket Nos. 0714, and 08-574; and Docket Nos. 03-971,05-545, 05-1059, 05-5130, 05-5202, 07A142, 07A370, 07-419, 07A601, 08-339, 08A399, 08-411, 08-574, 08A838, 08-942.

Virginia Constitution and Va. Code, as well as the mandate of *stare decisis* under the *Void* Order Doctrine to surreally give reciprocal effect to the VSBDB *void* order. Thus, they transformed the VSBDB *void* order into a valid order, so to find that Rodriguez was guilty of "misconduct" to deprive him of his right to federal unemployment compensation benefits in violation of the duty to provide a "fair hearing, before an impartial tribunal," as mandated by the 5th and 14th Amendments to the U.S. Constitution, the Social Security Act, Sec. 303 [42 U.S.C. 503], and 20 C.F.R. § 650.2.

However, in Virginia, because "[a] *void* judgment is one that has been . . . entered by a court that did not have jurisdiction over the subject matter. . . . " *Rook v. Rook*, 233 V. 92, 353 S.E2d 756, 758 (1987)(Emphasis added), it is clear that an order issued by the VSBDB as some entity without any jurisdiction or judicial authority would be *void* and actionable.

Also, neither the Supreme Court of Virginia, nor the Court of Appeals of Virginia, nor the VEC, can transform the VSBDB *void* order into as valid one, for as explained in *Morrison v. Bestler*, 239 Va. 166, 167-170, 387 S.E.2d 753 (1990),

> The term jurisdiction embraces . . . subject matter jurisdiction, which is the authority granted by the constitution or statute to adjudicate a class of cases or controversies. . . .**which cannot be waived or conferred on the court by agreement of the parties**. *Lucas v. Biller*, 204 Va. 309, 313, 130 S.E.2d 582, 585 (1963). A defect in jurisdiction cannot be cured . . . . While a court

always has jurisdiction to determine whether it has subject matter jurisdiction, **a judgment on the merits made without subject matter jurisdiction is null and void**. *Barnes v. American Fert. Co.*, 144 Va. 692, 705, 130 S.E. 902, 906 (1925). **Likewise, any subsequent proceeding based on such a defective judgment is void or a nullity**. *Ferry Co. v. Commonwealth*, 196 Va. 428, 432, 83 S.E.2d 782, 784 (1954). (Emphasis added).

B. *The VEC Void Order Deprived Rodriguez of his right to a "fair hearing, before an impartial tribunal."*

Pursuant to the 5th and 14th Amendments to the U.S. Constitution, the Social Security Act, Sec. 303.[42 U.S.C. 503], and 20 C.F.R. § 650.2, Rodriguez has a right a "fair hearing, before an impartial tribunal." Thus, it is clearly mandated by Congress and the Department of Labor that under the the Social Security Act, Sec. 303. [42 U.S.C. 503], and 20 C.F.R. § 650.2, unemployment compensation benefits enjoy procedural protection.

In *Torres v. New York State Department of Labor*, 321 F. Supp 432 (S.D.N.Y. 1971), *vacated and remanded*, 402 U.S. 968 (1971), *prior decision adhered t on remand*, 333 F. Supp 141 (S.D.N.Y. 1971), *aff'd* 405 U.S. 949 (1972), *reh. Denied*, 410 U.S. 971 (1973), this Court affirmed without opinion the decision of a three-judge district court which upheld challenge to a state's unemployment compensation laws and procedures on both due process and statutory grounds. *See, Fusari v. Steinberg*, 419 U.S. 379, *reh. Denied*, 420 U.S. 955 (1975).

The general definition of substantive and procedural *due process* is, "**the right to a fair hearing before a tribunal with the power to decide the case.**" Bryan A. Garner, Black's Law Dictionary, at page 538 (8th ed. 1999). (Emphasis added).

As noted above, a valid judgment may not be rendered by the VSBDB being an entity without judicial authority and jurisdiction to revoke Rodriguez's Virginia license to practice law, and the VEC and lower courts cannot subsequently converted into a valid one because it would be a violation of the constitutional protections of *due process*. *See* Restatements, Judgments § 4(b); *See also*, *Earle v. McVeigh*, 91US 503, 23 L Ed 398 (1999).[10] In sum, the genes of the *Void* Order Doctrine is rooted in *due process* concerns.

However, here the VEC and lower court gave effect to the VSBDB *void* order despite the evidence of first, the order not being issued by a "court" with jurisdiction, but by an entity within an unauthorized attorney disciplinary system created by the rules of the Va. Sup Ct. in violation of Article VI § 1, § 5, and § 7 of the Constitution of Virginia, and Va. Code § 54.1-3910, § 54.1-3915, § 54.1-3935. Thus, the VEC and lower courts decisions are *void*, and intentionally deprived Rodriguez of his statutory right to Federal unemploy-

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[10] The Court held that the standard in determining if a violation of *due process* has occurred is, "to see whether this process conflicts with any of the [Constitutional] provisions. If not found to be so, we must look to those statute law . . . ." *Murray's Lessee v. Hoboken and Improvement Co.*, 18 How (59 U.S.) 272, 276-277 (1855).

ment compensation and to substantive and procedural due process.

C. *Rodriguez Has Been Deprived of His Right to Access to Impartial Judicial Review of the Denial of his right to federal unemployment compensation benefits by misprision of a felony.*

The primary purpose of the Virginia Unemployment Compensation Act is to provide temporary financial assistance to persons who become unemployed through no fault of their own. Va. Code § 60.2-100 et seq. 1950 as amended. The Act is remedial in nature and should be liberally construed to effect its beneficent aims to unemployed individuals. *Ford Motor Company v. Unemployment Comp. Comm'n*, 191 Va. 812, 63 S.E.2d 28 (1951); 81 C.J.S., Social Security, § 147.

However, under section 60.2-618(2), the VEC is authorized to determine that an individual is disqualified from unemployment benefits if he or she has been discharged for "misconduct connected with his work."[11] An employee is guilty of misconduct when he or she, "**deliberately violates a company rule** reasonably designed to protect the legitimate business interests of his employer, ..." *Branch v Virginia Employment Comm'n*, 219 Va. 609, 611, 612, 249 S.E.2d 180, 182

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[11]**VA Code § 60.2-618. Disqualification for benefits.** An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked 30 days or 240 hours or from any subsequent employing unit: . . . if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work.

(1978)(Emphasis added.

In determining "misconduct,"although the factual findings of the VEC are conclusive when seeking impartial judicial review on appeal, **they are so only if the VEC's determination is supported by evidence and is issued in absence of fraud**. Va. Code § 60.2-525(A), 1950 as amended; *Virginia Employment Commission v. Gantt*, 7 Va. App. 631, 376 S.E.2d 808 (1989). Only after the employer has borne the burden of showing misconduct connected with work, either violation of a rule or by act manifesting a willful disregard of the employer's interest, does the burden shift to the employee. *Gantt* 7 Va. App. 635.

Consequently, the jurisdiction of the lower courts in conducting impartial judicial review is first to assure that there is evidence to support the findings of the VEC and that there has been no fraud, only then confine itself to questions of law. Va. Code § 60.2-625(A).

In providing impartial judicial review the Courts have adopted as a rule of law the VEC interpretation that section 60.2-618(2) means that the employer bears the burden of proving that the claimant was discharged for misconduct *Jones v. Willard*, 224 Va. 602, 299 S.E.2d 504 (1983); 1A Michie's Jurisprudence, Administrative Law, § 8. Thus, it is the employer ("De Novo") who bears the burden of proving that Rodriguez was discharged for reasons which constitute misconduct under section 60.2-618(2). But, De Novo was never required by the VEC to present any evidence that

Rodriguez violated said company rules.[12]

The United States Supreme Court has held that "(i)n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Likewise, in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), the Supreme Court found that cross-examination and confrontation must be permitted whenever "governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings" was one of the "immutable' principles of our jurisprudence."

Rather, the record confirms that at each stage of the administrative process it has been the VEC who has been carrying the burden of fraudulently alleging that Rodriguez was ineligible for unemployment benefits on the grounds of "misconduct" for violating a De Novo's company rule-by it assuming away its duty to provide impartial review of the VSBDB *void* order.

To this end, the Hearing Examiner and VEC disregarded the unopposed sworn testimony of Mr. Joe Kanka (the former Office Manger of De Novo), confirm-

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[12]There was only an initial unsworn statement to the Deputy under Va. Code § 60.2-619 by an unnamed employee of De Novo made at some time after the Determination Notice was issued on October 29, 2007, "that [Rodriguez] falsely represented himself as an attorney with an active license to practice law. The Claimant's Virginia license was revoked, making him unable to practice law and leaving the employer open to litigation by the client."

ing that De Novo company rule for employment in the District of Columbia for either recent unlicensed law graduates or experienced attorneys licensed in admitted to a State Bar outside of DC was to have an application pending before the D.C. Committee on Admission. Mr. Kanka testified that Rodriguez had at all times been in compliance with De Novo's company rule until said rule was changed only as to Rodriguez.[13]

The undisputed evidence confirms that it was not until a month and a half after being discharge, on May 14, 2009, did the DC Committee denied Rodriguez of his rights under D.C. Ct of Appeal Rule 46, to either withdraw his waiver application or provide a public hearing on the merits of Rodriguez' application. The DC Committee had no authority to deny a hearing and advise that they would not process his application.[14]

Thus the evidence confirms that the DC Committee unlawfully shelved Rodriguez waver application for almost two years, and then a month and half on May 14, 2007, **after** Rodriguez was discharged by De Novo on March 30, 2007, it issued a letter assuming away Rodriguez' waiver application. But, the D.C. letter is

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[13]The undisputed evidence confirms that on the date of discharge by De Novo on March 29, 2007, Rodriguez had still pending a valid waver application before the DC Committee on Admission.

[14]The D.C. Court of Appeals held in *In re Anthony E. Ramos*, 860A.2d 843, 845 (D.C. 2004), that on its face **"the plain and unambiguous language of Rule 46(f)(1) requires the [Committee] to conduct a hearing in any case in which an applicant who has been refused certification requests one"**). Emphasis added.

irrelevant to the question of whether the Rodriguez is eligible for benefits based on violating a company rule - because the conduct complained of (i.e. allegedly not having any longer a valid waiver application pending on May 15, 2007) was not the basis for discharge on March 30, 2007, as required under the governing statute.

In sum, (I) Rodriguez was employed by De Novo not in Virginia, but in the District of Columbia; (II) De Novo company rule made Rodriguez bar status in Virginia immaterial; (III) that on the date of discharge Rodriguez had an application pending to the D.C. Bar. Thus, De Novo failed to carry the burden of the "deliberate" violation of any company rule by Rodriguez to uphold the finding of "misconduct.".

II. THERE HAS BEEN PERMITTED EGREGIOUS TRESPASSING UPON RODRIGUEZ'S RIGHT TO FEDERAL UNEMPLOYMENT COMPENSATION BENEFITS.

The factual findings of the VEC are conclusive on appeal, "in absence of fraud." Va. Code § 60.2-525(A).[15]

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[15]Fraud is commonly understood as dishonesty calculated for advantage. Fraud is an independent criminal offense. Federal and state criminal statutes provide for the punishment of persons convicted of fraudulent activity. Relevant to the administration of federal unemployment compensation benefits, interstate fraud and fraud on the federal government are singled out for federal prosecution. The most common federal fraud charges are for mail and wire fraud. Mail and wire fraud statutes criminalize the use of the mails or interstate wires to create or further a scheme to defraud (18 U.S.C.A. §§ 1341, 1342).

Here, there is evidence of fraud by the VEC refusing to place the burden on De Novo, the giving of legal effect to the VSBDB *void* order, and the retroactive applying of the *void* act of the D.C. Committee denying Rodriguez of his rights to a public hearing pursuant to D.C. Ct of Appeal 46.. Also, there is evidence of fraud on the public trust by the VEC and Lower Courts by the misprision of treason and misprision of a felony by conspiring to cover-up the issuance of VSBDB *void* order.

The evidence confirms that the VSBDB's *void* order has been the linchpin-admittedly one made of gossamer fiber- issued to punish and silence Rodriguez by the VEC find "misconduct" to deprive Rodriguez of his right to federal unemployment compensation benefits. This cannot be permitted by this Court because, a "right . . . granted by Congress and cannot be taken away by the State." (Emphasis added). *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964).

The surreal and absurd use of VSBDB *void* order to deprive Rodriguez of his right to Federal unemployment compensation benefits cannot be sanctioned by this Court. As stated in *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 404 (1821), the Court stated that the Judicial Branch has, "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." (Emphasis added)

CONCLUSION

For the above reasons, in the interest of justice this Court must grant the Petition.

Respectfully submitted,

By: *Isidoro Rodriguez, Esq*

Isidoro Rodriguez, Esq.
Admitted to the Bar of
The United States Supreme Court, Sept. 11, 1992

APPENDIX
TABLE OF CONTENT

1. Order of the Supreme Court of Virginia dismissing appeal for lack of jurisdiction, Record No. 092494, February 2, 2010, *Isidoro Rodriguez v. Virginia Employment Commission,* A-1

2. Order of the Court of Appeals of Virginia denying Petition for Rehearing *en Banc*, Record No; 0291-09-4, November 12, 2009, *Isidoro Rodriguez v. Virginia Employment Commission,* A-2

3. Order of the Court of Appeals of Virginia affirming *void* order of the Virginia Employment Commission, Record No; 0291-09-4, September 29, 2009, *Isidoro Rodriguez v. Virginia Employment Commission,* A-3

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 2nd *day of* February, 2010.

Isidoro Rodriguez,

Appellant,

against Record No. Record No; 092494
Court of Appeals No. 0291-09-4

Virginia Employment Commission,

Appellee.

From the Court of Appeals of Virginia

The Court dismisses the petition for appeal filed in the above-styled case for lack of jurisdiction. Code § 17.1-410(A) (2) and (B).

A Copy,

Teste:
Patricia Harrington, Clerk
By: /s/
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday *the* 12th of November, 2009,

Isidoro Rodriguez,

Appellant,

against Record No. Record No. 0291-09-4
Circuit Court No. CL-2008-10996

Virginia Employment Commission,

Appellee.

Upon a Petition for Rehearing En Banc
Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 29th day of September, 2009 and grant a rehearing *en bane* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en bane* in this case. Code § 17.1-402(D).

A Copy,

Teste:
Cynthia L. McCoy, Clerk
original order signed by a deputy clerk of the Court of Appeals of Virginia at the direction of the Court
Deputy Clerk

UNPUBLISHED
COURT OF APPEALS OF VIRGINIA

Present: Judges Kelsey, Petty and Senior Judge Clements Argued at Alexandria, Virginia

MEMORANDUM OPINION*
BY JUDGE JEAN HARRISON CLEMENTS
SEPTEMBER 29,2009

ISIDORO R. RODRIGUEZ

v. Record No.0291-09-4

VIRGINIA EMPLOYMENT COMMISSION

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Leslie M. Alden, Judge

Isidoro Rodriguez, pro Se.

Elizabeth B. Peay, Assistant Attorney General (William C. Mims,
Attorney General, on brief), for appellee.

Isidoro Rodriguez (Rodriguez) contends the Circuit Court of Fairfax County erred in affirming the decision of the Virginia Employment Commission (Commission) denying his claim for unemployment compensation benefits. In his brief, Rodriguez presents five issues -(1) challenging the sufficiency of the evid-

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

ence supporting the denial of his claim(2) asserting the underlying revocation of his Virginia law license is void, (3) contending the Commission failed to provide proper notice of the employer's claim or give him an opportunity to respond, (4) arguing that the Commission improperly used only one employer for the basis of unemployment benefits, and (5) asserting that the circuit court impermissibly corrected his statement of facts. For the reasons that follow, we disagree with Rodriguez's contentions and affirm the circuit court's decision.[1]

As the parties are fully conversant with the record in this case, and because this memorandum opinion carries no precedential value, this opinion recites only those facts and incidents of the proceedings as are necessary to the parties' understanding of the disposition of this appeal.

BACKGROUND

"On review, [we] must consider the evidence in the light most favorable to the finding by the Commission." Virginia Employment Comm'n v. Peninsula Emergency Physicians Inc., 4 Va. App. 621, 626, 359 S.E.2d *552,* 554-55 (1987).

Rodriguez was employed as a contract attorney from January 29 to March 29, 2007 by De Novo Legal and was assigned to a client in the District of Columbia (D.C.). During that time period, Rodriguez worked for

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[1]Rodriguez's motion to enjoin the Commission is hereby denied.

the employer for more than 30 day and 240 hours.

Rodriguez, a member of the Virginia State Bar, applied for admission to the District of Columbia Bar (D.C. Bar) after the Committee on the Unauthorized Practice of Law of the District of Columbia Court of Appeals issued an opinion that contract attorneys who regularly worked in D.C. were required to be members of the D.C. Bar.

On August 26, 2005, Rodriguez was notified that his application for admission to the D.C. Bar had been received. Rodriguez based his application on having been a member in good standing of the Virginia State Bar. The notification letter directed Rodriguez to "inform the [Administrator's] Committee by letter of any change in circumstance (e.g. bar admissions, disciplinary matters, etc.)."

Under existing D.C. Bar procedures, Rodriguez was permitted to continue to practice in D.C. while his application was pending. When Rodriguez was offered the position with De Novo Legal, he was relying on his still-pending application for admission to the D.C. Bar as authority to practice law in D.C.

On November 28, 2006, the Virginia State Bar issued an order revoking Rodriguez's license to practice law in Virginia effective October 27, 2006. Rodriguez appealed that order to the Supreme Court of Virginia, which affirmed the revocation by order dated June 29, 2007.

Rodriguez failed to advise the D.C. Bar of the

revocation order when it was issued. On April 6, 2007, Rodriguez filed a motion for immediate admission or for a public hearing on his application for admission to the D.C. Bar. At that time he attached a copy of the Virginia State Bar's revocation order. The D.C. Bar then advised Rodriguez that his application could no longer be considered because he was ineligible for admission to the D.C. Bar until he had successfully regained his license to practice law in Virginia.

While working for De Novo Legal, a co-worker learned Rodriguez's Virginia law license had been revoked and alerted the employer. Because Rodriguez's position as a contract attorney required that he be a member of the D.C. Bar or that he have a valid application pending, De Novo Legal discharged him.

The Commission denied Rodriguez's claim for unemployment benefits finding he had been discharged for misconduct connected with work. Rodriguez appealed that decision to the circuit court. The circuit court determined the factual findings of the Commission were supported by the evidence and the Commission correctly applied the law to the facts of the case. The circuit court, in a December 5, 2008 order, affirmed the Commission's decision.

ANALYSIS

I.

In the course of an appeal of a Commission decision to the circuit court or this Court, "the findings of the Commission as to the facts, if supported by

evidence and in the absence of fraud, shall be conclusive." Code § 60.2-625(A). "As the factfinder, the commission is charged with the responsibility of resolving [both] questions. . . of controverted facts" and "questions of credibility." Virginia Employment Comm'n v. Gantt, 7 Va. App. 631, 635, 376 S.E.2d 808, 811 (1989). Further, the Commission is not required to articulate its reasons for accepting the testimony of one witness over another. Bullion Hollow Enters., Inc. v. Lane, 14 Va. App. 725, 729, 418 S.E.2d 904, 907 (1992). Upon our review, we conclude that the Commission's findings of fact are supported by evidence and are therefore binding on appeal.

An employee shall be disqualified from receiving unemployment benefits "if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work." Code § 60.2-618. Under settled principles,

> an employee is guilty of "misconduct connected with his work" when he *deliberately* violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a *willful* disregard of those interests and the duties and obligations he owes his employer.

Branch v. Va. Employment Comm'n, 219 Va. 609,611,249 S.E.2d 180, 182(1978).

> [M]sconduct is defined in the disjunctive so that either a deliberate violation of a rule or an act or

omission showing willful disregard of the employer's interest disqualifies a claimant for benefits. When an employer adopts a rule, that rule defines the specific behavior considered to harm or to further the employer's interests. By definition, a violation of that rule disregards those interests. The rule violation prong, then, allows an employer to establish a prima facie case of misconduct simply by showing a deliberate act which contravenes a rule reasonably designed to protect business interests.

Gantt, 7 Va. App. at 634-35, 376 S.E.2d at 811.

If an employer presents *prima fade* evidence of misconduct, the burden shifis to the claimant to prove "circumstances in mitigation ofsuch conduct." Branch, 219 Va. at 611-12, 249 S.E.2d at 182.

> Mitigating circumstances are likely to be those considerations which establish that the employee's actions were not in disregard of [the employer's] interests. Evidence of mitigation may appear in many forms which, singly or in combination, to some degree explain or justify the employee's conduct. Various factors to be considered may include: the importance of the business interest at risk; the nature and purpose of the rule; prior enforcement of the rule; good cause to justify the violation; and consistency with other rules. Therefore, in order to constitute misconduct, the total circumstances must be sufficient to find a deliberate act of the employee which disregards the employer's business interest.

Gantt, 7 Va. App. at *635*, 376 S.E.2d at 811. Absent proof of circumstances in mitigation, established to the satisfaction of the fact finder, the employee is "disqualified for benefits." Branch, 219 Va. at 611-12, 376 S.E.2d at 182.

The record supports the determination that the employer terminated Rodriguez because his Virginia law license had been revoked and, as a result, he could not continue to work as a contract attorney practicing law in D.C. Although Rodriguez had applied for admission to the D.C. Bar, his ability to practice law in D.C. was contingent upon his Virginia law license remaining in effect. Rodriguez failed to advise his employer of the revocation of his Virginia law license and did not inform the D.C. Bar of the revocation until April 2007. The revocation of Rodriguez's law license constituted misconduct associated with his employment and Rodriguez failed to demonstrate the existence of any mitigating circumstances.

II.

Rodriguez appears to argue the order from the Virginia State Bar Disciplinary Board revoking his license to practice law was void and that, therefore, the Commission and the circuit court were prohibited from giving it effect. Rodriguez provides no support for his contention that either the Commission or the circuit court had authority to declare void the orders of the Virginia State Bar Disciplinary Board and the Supreme Court of Virginia.

The Commission was called upon to determine

whether the employer correctly discharged Rodriguez for misconduct. Relying upon the fact that Rodriguez's license to practice law had been revoked by the Virginia State Bar, a determination upheld by the Supreme Court of Virginia, the Commission did not err in concluding that the employer properly discharged Rodriguez due to the loss of his law license. Likewise, the circuit court's role in an appeal from the Commission is to determine if the Commission's findings of fact were supported by evidence. See Code § 60.2-625(A). Rodriguez cannot now attempt to attack collaterally the facially valid revocation of his Virginia law license.

III.

Rodriguez asserts the Commission failed to properly notify him of the employer's claim or give him an opportunity to respond. In fact, the record reveals that Rodriguez was provided the opportunity to present his case at the various Commission hearings and that he participated in all three fact-finding hearings. The employer issued a statement to the Commission and Rodriguez had the opportunity to provide a rebuttal statement. The Commission timely notified Rodriguez by mail of its decision and explained the reasons for finding him disqualified from receiving unemployment benefits. Therefore, we find no merit in Rodriguez's contentions.

IV.

Code § 60.2-618 provides that in determining whether a claimant is disqualified from receiving benefits, the Commission looks at the "separation from

the last employing unit for whom he has worked 30 days or 240 hours or from any subsequent employing unit." Rodriguez was employed by De Novo Legal from January 29 until March 29, 2007 and worked for that employer for more than 240 hours during that time period.

Although Rodriguez worked for another employer from February through April 2007, the Commission determined he did not work for that employer for 30 days or 240 hours. The record supports the Commission's factual finding. The Commission correctly used De Novo Legal as the employing unit for determining whether Rodriguez was entitled to receive unemployment benefits.

V.

Rodriguez asserts that the trial judge "[w]ithout notice or hearing" issued a corrected statement of facts in violation of Rule 5A:8(d).

"The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." Ohree V. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998). See Rule 5A: 18. Rodriguez failed to present this argument to the trial court. Accordingly, Rule SA: 18 bars our consideration of this question on appeal.

> Although Rule *5A:*18 allows exceptions for good cause or to meet the ends ofjustice, appellant does not argue that we should invoke these exceptions. See e.g., Redman v. Commonwealth,

> 25 Va. App. *215,* 221, 487 S.E.2d 269, 272 (1997) ("In order to avail oneself of the exception, a *defendant must affirmatively show* that a miscarriage ofjustice has occurred, not that a miscarriage might have occurred." (emphasis added)). We will not consider, *sua sponte,* a "miscarriage of justice" argument under Rule *5A:* 18.

Edwards V. Commonwealth, 41 Va. App. 752, 761, *589* S.E.2d 444, 448 (2003) *(en hanc).* For the reasons stated above, we affirm the circuit court's decision.

Affirmed.